IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 02.02.2007

Coram

The Hon'ble Mr. Justice K.CHANDRU

W.P. Nos.22389 and 24781 of 2006
and
M.P.No.1 of 2006 in W.P.No.22389 of 2006
and
M.P.No.1 of 2006 in W.P.No.24781 of 2006

K.Shanmugasundaram .. Petitioner in W.P.No.22389 of 2006

S.Kalaivanan .. Petitioner in W.P.No.24781 of 2006

vs.

1. The Government of Tamil Nadu
   Rep. by its Secretary
   Highways Department
   Fort St. George
   Chennai-9

2. The Chief Engineer (G)
   Highways and Rural Works
   Chepauk, Chennai -5 .. Respondents in both W.Ps.

Petitions filed under Article 226 of the Constitution of India seeking for issue of writ of Mandamus directing the second respondent to give posting orders to the petitioners in the promoted post of Assistant Divisional Engineer pursuant to the order of promotion issued in G.O.Ms.No.57 Highways (H.K.1) Department dated 17.3.2006.within time frame.

For Petitioner : Mr.V.Sanjeevi
For Respondents : Mr.V.R.Thangavelu, G.A.

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C O M M O N O R D E R

Since the facts involved in both the petitions are identical, the writ petitions are taken together and a common order is passed.

2. I have heard the arguments of Mr.V.Sanjeevi, learned counsel appearing for the petitioners and Mr.V.R.Thangavelu, learned Government Advocate representing the respondents and have perused the records.

3. In both the writ petitions, the petitioners are seeking for a direction to the second respondent to give posting orders to the

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petitioners in the promoted post of Assistant Divisional Engineer pursuant to the order of promotion issued in G.O.Ms.No.57 Highways (H.K.1) Department dated 17.3.2006 within a time frame fixed by this Court.

4. Mr.K.Shanmugasundaram, the petitioner in W.P.No.22389 of 2006, was working as an Additional Panchayat Union Engineer, Pullambody Panchayat Union at the relevant time and Mr.Kalaivanan was working as an Assistant Engineer in the National Highways Quality Control section at Tiruchirapalli. In the case of the petitioner in W.P.No.22389 of 2006, it is stated that by G.O.Ms.No.57, Highways (HK 1) Department dated 17.3.2006 issued by the Government, they are to be temporarily promoted as Assistant Divisional Engineer in Category 4 of the Tamil Nadu Highways Engineering Services with effect from the date of their assumption of duty based on the posting orders issued by the Chief Engineer, Highways Department, the petitioners' names are found as serial No.41 and 22 respectively. It is also stated that on receipt of the said order, the second respondent did not give any posting order, which prompted the petitioner in W.P.No.22389 of 2006 to write a letter dated 09.5.2006 to the second respondent stating that at the time when the promotion order was made, a report was sent by the Panchayat Union Commissioner that there was no charges pending against him vide his letter dated 02.8.2005 and, therefore, when the Government issued order dated 17.3.2006 promoting the petitioner temporarily, there was no impediment to assume charge. However, it is stated by him that on 24.4.2006, he received a letter from the second respondent enclosing a charge memo given to him under Rule 17(B) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules and according to him, the subsequent charge memo should not be used as a tool to deny him promotion which was accorded to him earlier. When he did not receive any reply and when he found that 114 persons, who were found in the Government Order, have been given necessary posting orders, and he and the petitioner in the other writ petition alone have been denied posting order, which is illegal, filed the writ petition being W.P.No.22389 of 2006.

5. The petitioner in W.P.No.24781 of 2006 more or less had the similar grounds and by the very same G.O., he was promoted as Assistant Divisional Engineer and he was also not given any consequential posting order despite a request has been made him vide letter dated 28.7.2006. He has also filed a writ petition being W.P.No.24781 of 2006 for similar relief.

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6. However, the learned counsel appearing for the petitioners fairly submitted that the petitioner in the latter writ petition, viz., Kalaivanan, has received a proceedings from the Tribunal for disciplinary action vide letter dated 30.3.2006 in which charges have been framed against him and the charge relates to violation of Rule 20 (1) of the Tamil Nadu Government Servants Conduct Rules and this involves misappropriation and falsification of records of the Nominal Muster Rolls for the period 1998 - 2003 amounting to Rs.5,73,660/-. It is not indicated in the said order as to when the reference was made

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to the Tribunal for disciplinary proceedings. However, the fact of the matter in both the cases is that the petitioners are facing serious charges and they are claiming the right of promotion only on the basis of the promotion order made by the Government vide G.O.Ms.No.57 Highways (HK 1) Department dated 17.3.2006. It is also an admitted fact that both of them have not received any posting order and it has been withheld for the reason that there has been disciplinary proceedings initiated against them. It is the contention of the learned counsel for the petitioners that the subsequent disciplinary action taken against them will not enable the Department to withhold giving consequential posting orders and they are entitled to enforce the order of the Government in this regard.

7. In the case of the petitioner in W.P.No.22389 of 2006, it is seen from annexure 3 to the charge memo that a report was sent by the Executive Engineer, Rural Development - cum - Assistant Project Officer as early as 25.5.2005 to the Government and that was pending consideration by the Government and since the Government is the competent authority in framing the charge memo, it had taken that time. It is a case that one wing of the Government is not aware of what the other wing is doing. Certainly, it is not open to the petitioners to contend that there was nothing pending against them. In fact, in the matter of granting promotion, even a contemplated disciplinary proceedings can be taken note of as can be seen from the decisions cited herein.

8. In the case of the petitioner in W.P. No.24781 of 2006, it is seen that charges were framed by the Tribunal for disciplinary proceedings on 30.3.2006. But as to when the reference was made to the Tribunal is not clear and certainly, it should have been only before the promotion orders were issued by the Government.

9. In matter of promotion for any office under the first respondent, it is governed by G.O.Ms.No.368 Personnel and Administrative Department dated 18.10.1993. The subsequent amendments to the said order clearly state that even if the charge memo is stayed by any Court, the promotion to any post will be deferred depending upon the outcome of the said proceedings. In the first respondent Government, there is no sealed cover procedure and therefore, the employees will have to suffer consequences of denial of promotion when they are faced with disciplinary action on serious charges. This is inevitable considering the fact that a person cannot be expected to be promoted while facing serious charges and in the event of his failing in the departmental action, it will result in a person discharging duties attached to higher office when he is not eligible to hold the said post. However, even after the case being bye-passed due to the pendency of any disciplinary action or any contemplated disciplinary action, the decisions of the Supreme Court had guaranteed the right of such an employee and their position will be restored depending upon the outcome of the disciplinary action taken against him.

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10. However, Mr. V.Sanjeevi, learned counsel appearing for the petitioners wanted to contend that once the order is issued by the Government, no authority subordinate to him can withhold the said order and in the present case, the charge memos were issued subsequent to the promotion order and, therefore, the petitioners are eligible to get promotion order and the writ petitions should be ordered accordingly.

11. However, this argument is fallacious since in the order itself stated that it depends on the consequential posting order. It is seen that the charges relating to commissions and omissions committed by the petitioners were not anterior to the promotion order passed by the Government and it is only a formal order of framing a charge that came to be made later and when that is brought to the notice of the respondents, it is certainly open to them to withhold the order of promotion.

12. The learned counsel appearing for the petitioners first relied on the decision of the Supreme Court reported in 1991 Suppl. (2) SCC 199 [C.O.Arumugam and others vs. State of Tamil Nadu and others] and emphasised in paragraphs 8 and 9, which read as follows:

> "Para 8 : Thiru L.V.Srinivasan, respondent 4, was not included in the panel for promotion since there were disciplinary proceedings then pending against him. But when the panel was prepared and approved, there was no charge framed against him. It is, therefore, not proper to have overlooked his case for promotion. We therefore, direct that his case be considered for promotion on the date on which his junior was promoted and if he is found suitable he must also be promoted with all consequential benefits.
>
> Para 9: Thiru G.P. Purushothaman, respondent 5, appears to be an exception to the preceding norm. It is said that there was then charge sheet filed against him in the pending enquiry when the panel was prepared. His exclusion for promotion could not therefore be inappropriate. We may, however, observe that if he is exonerated in the pending enquiry, he be considered for promotion from the date on which his junior was promoted and if found suitable he be given promotion with all consequential benefits, but subject to seniority to be determined in C.A. Nos. 3815 and 3816 of 1998 pending in this Court. We may also observe that the departmental enquiry pending against him may be expedited."

I do not know as to how these passages can have any assistance to the learned counsel for the petitioners. The reasoning of the Supreme Court is found in paragraph 5 of the said judgment, which is extracted below:

> "Para 5: As to the merits of the matter, it is necessary to state that every civil servants has a right to have his case considered for promotion according to his turn and it is a guarantee flowing from Articles 14

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and 16(1) of the Constitution. The consideration of promotion could be postponed only on reasonable grounds. To avoid arbitrariness, it would be better to follow certain uniform principles. The promotion of persons against whom charge has been framed in the disciplinary proceedings or charge sheet has been filed in criminal case may be deferred till the proceedings are concluded. They must, however, be considered for promotion if they are exonerated or acquitted from the charges. If found suitable, they shall then be given the promotion with retrospective effect from the date on which their juniors were promoted."

13. Thereafter, learned counsel appearing for the petitioners relied upon the judgment of the Supreme Court reported in (1999) 5 SCC 762 [Bank of India and another vs. Degala Suryanarayana] and paragraph 14 of the said judgment, which was emphasised by the petitioner, is extracted below:

"However, the matter as to promotion stands on a different footing and the judgments of the High Court have to be sustained. The sealed cover procedure is now a well established concept in service jurisprudence. The procedure is adopted when an employee is due for promotion, increment etc. but disciplinary/criminal proceedings are pending against him and hence the findings as to his entitlement to the service benefit of promotion, increment etc. are kept in a sealed cover to be opened after the proceedings in question are over (see Union of India vs K.V. Janakiraman SCC at pp.114-115: AIR at p.2013). As on 1.1.1986 the only proceedings pending against the respondent were the criminal proceedings which ended in acquittal of the respondent wiping out with retrospective effect the adverse consequences, if any, flowing from the pendency thereof. The departmental enquiry proceedings were initiated with the delivery of the charge sheet on 3.12.1991. In the year 1986-87 when the respondent became due for promotion and when the Promotion Committee held its proceedings, there were no departmental enquiry proceedings pending against the respondent. The sealed cover procedure could not have been resorted to nor could the promotion in the year 1986-87 be withheld for the DE proceedings initiated at the fag end of the year 1991. The High Court was therefore right in directing the promotion to be given effect to to which the respondent was found entitled as on1.1.1986. In the facts and circumstances of the case, the order of punishment made in the year1995 cannot deprive the respondent of the benefit of the promotion earned on 1.1.1986."

14. Learned counsel further relied on the decision of the Supreme Court reported in 2000 (7) SCC 210 [Delhi Jal Board vs. Mahinder

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Singh] and paragraph 5 relied on by the learned counsel for the petitioners is extracted below:

> "The right to be considered by the Departmental Promotion Committee is a fundamental right guaranteed under Article 16 of the Constitution of India, provided a person is eligible and is in the zone of consideration. The sealed cover procedure permits the question of his promotion to be kept in abeyance till the result of any pending disciplinary inquiry. But the findings of the disciplinary inquiry exonerating the officer would have to be given effect to as they obviously relate back to the date on which the charges are framed. If the disciplinary inquiry ended in his favour, it is as if the officer had not been subjected to any disciplinary inquiry. The sealed cover procedure was envisaged under the rules to give benefit of any assessment made by the Departmental Promotion Committee in favour of such an officer, if he had been found fit for promotion and if he was later exonerated in the disciplinary inquiry which was pending at the time when DPC met. The mere fact that by the time the disciplinary proceedings in the first inquiry ended in his favour and by the time the sealed cover was opened to give effect to it, another departmental enquiry was started by the Department, would not, in our view, come in the way of giving him the benefit of the assessment by the first Departmental Promotion Committee in his favour in the anterior selection. There is, therefore, no question of referring the matter to a larger Bench."

This decision arose out of the Rules of the Delhi Water Board wherein the sealed cover procedure is adopted by the said Board and in that context, the said judgment has been given and in no way, it will be helpful to the case of the petitioners.

15. Further, the learned counsel relied upon the judgment of a learned Judge of this Court reported in 2006 W.L.R. 346 [A.Karunanidhi vs. The Government of Tamil Nadu] wherein the facts of the case have been summarised in paragraph 2, which is reads follows:

> ".... The reason given for consideration of petitioner's name for inclusion in the panel was due to the pendency of the disciplinary proceeding. According to the petitioner, even after dropping all the said charges, petitioner's name was not included in the panel prepared for the year 2003-2004 for promotion to the post of Assistant Executive Engineer and the stand taken was that petitioner's name would be considered during the year 2004-2005."

The finding of the learned Judge, which is found in paragraph 6, reads as follows:

> "Admittedly the charge levelled against the petitioner under Rule 17(b) was dropped through G.O.Ms. No.172 PDW (E2) Department, dated 4.5.1999 and a copy of the said

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order is filed in the additional typed set of papers. The recovery proceeding initiated against the petitioner is only under rule 17(a) and the same is also established before this Court as mentioned in the petitioner's representation dated 4.4.2004 submitted to the first respondent. It is a settled law that pendency of proceeding under Rule 17(a) is not a bar for considering the name of an employee for promotion."

I do not think the above judgment has any relevant to the facts of the present cases.

16. On the contrary, the Supreme Court judgment referred to in 1999 (5) SCC 762 [cited supra] heavily relies upon the judgment of the Supreme Court reported in 1991 (4) SCC 109 [Union of India vs. K.V.Janakiraman]. Therefore, it is necessary to examine the import of the Supreme Court decision in the present context.

17. In (1991) 4 SCC 109 [Union of India and others vs. K.V.Janakiraman and others], the Supreme Court considered the issue whether the sealed cover procedure adopted in the Central Government Department should be resorted to even at the stage of preliminary investigation or only after the charge memo or charge sheet issued to the Government servant and it was observed as follows:

> "As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy."

18. In fact, even before that, the Supreme Court in (1991) 4 SCC 129 [Union of India vs. Tejinder Singh], in paragraph 4 of the judgment, held as follows:

> "The appeal is accordingly allowed and the impugned order passed by the Central Administrative Tribunal directing the Union of India, Ministry of Finance to consider the respondent for promotion to the post of Commissioner of Income Tax, Level II, is set aside. While setting aside the impugned order of the Tribunal we would like to record that the Tribunal had no jurisdiction whatever while dealing with a petition to quash the contemplated departmental enquiry against the respondent, to make an interim

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order of this nature. We are also not satisfied as to the correctness of the view expressed by the Tribunal that a contemplated departmental inquiry or pendency of a departmental proceeding cannot be a ground for withholding consideration for promotion or the promotion itself. We are not aware of any rule or principle to warrant such a view. As at present advised, we do not subscribe to the view expressed by the Tribunal."

19. In fact, after taking into account the said decision, the State Government / the first respondent herein issued a circular in amending G.O.Ms.No.368 Personnel and Administrative Reforms Department dated 18.10.1993 and the amendment made by virtue of the said circular has been amended twice by the Government by letter dated 16.6.1994 and thereafter, by letter dated 17.5.1995.

20. Under these circumstances, it is well open to the authorities to withhold grant of the posting order as both the petitioners are facing serious charges and unless they are acquitted in the departmental proceedings, they cannot claim to hold a higher post and discharge the duties attached to a higher post thereby causing considerable embarrassment to the Department. Further, the balance of convenience is to deny them promotion and they are faced with serious disciplinary action and if they succeed, they can get all the benefits as are available to them under law and in case, if they lose the writ petitions, nothing can be done either about the recovery or about the nature of orders to be passed by them in this regard.

21. In the light of the above, the writ petitions fail and the same shall stand dismissed. However, there will be no order as to costs. Consequently, connected Miscellaneous Petitions will also stand dismissed.

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Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Secretary,
   Government of Tamil Nadu
   Highways Department, Fort St. George, Chennai-9

2. The Chief Engineer (G)
   Highways and Rural Works,Chepauk, Chennai-5.

+2 ccs to Mr.V.Sanjeevi,Advocate Sr.No.6204.

GG(co)

dcp/1.3.07 W.P.Nos.22389 & 24781 of 2006

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